MOTION FILED
MAY 16 1983

Office - Supreme Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS
CLERK

No. 82-585
No. 82-586

In The
Supreme Court of the United States
October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND AMICUS CURIAE BRIEF, OF THE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

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No. 82-585
No. 82-586

In The
Supreme Court of the United States
October Term, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE, DIRECTOR OF TAXATION, STATE OF HAWAII[1]

The Multistate Tax Commission, its member states, and the States joining in this motion and attached *amicus* brief are vitally interested in the ability of the States to exercise their sovereign taxing powers without undue restraints. For the reasons set forth in the attached *amicus* brief, and for the reasons set forth in the Statement of Interest contained in that brief, the Multistate Tax Com-

[1]Although the State of Hawaii consented to the filing of an *amicus* brief by the Air Transport Association of America, Counsel for Hawaiian Airlines has refused to consent to the filing of an *amicus* brief by the Multistate Tax Commission. The Commission's brief is prepared on behalf of itself, its member states, and the states specifically participating in the brief.

mission hereby requests permission to file the attached *amicus* brief in support of the position of the State of Hawaii. The Multistate Tax Commission makes this motion only for the case of *Hawaiian Airlines, Inc. v. Director of Taxation, State of Hawaii,* No. 82-586 because Hawaiian Airlines, Inc. has refused to consent to the filing of this *amicus* brief. Aloha Airlines, Inc. has filed a consent letter with this court for the companion case of *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii,* No. 82-585.

The Multistate Tax Commission, as a multistate agency, is concerned that the broad implications of this decision will affect not only those states that allegedly levy annual general business taxes on airline gross receipts[2] but also will affect all states that have general business or property taxes that are measured in whole or in part by gross receipts or gross income derived from air transportation.

Because the Multistate Tax Commission's interest in this case is as significant as that of the United States and the Air Transport Association of America as *amici,* the Multistate Tax Commission respectfully files this Motion for Leave To File the attached *amicus* brief.

Respectfully submitted,

EUGENE F. CORRIGAN
Executive Director
Multistate Tax Commission

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[2]See the states designated in the Br. for the United States at 11 nn.15 & 16.

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BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES[3]

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the MTC) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact), entered into currently by nineteen states and the District of Columbia as full members, and by

[3]This brief is submitted by the Multistate Tax Commission and participating states in support of the Appellee State of Hawaii. Aloha Airlines has consented to the filing of this brief. The original of the consent letter from Aloha Airlines is on file with the Clerk of the Court.

eleven states as associate members.[4] The purposes of the Compact include the promotion of uniformity or compatibility in significant components of tax systems.[5]

The MTC is vitally interested that this Court uphold the well-reasoned decision and judgment of the Hawaii Supreme Court in *In re Tax Appeal of Aloha Airlines, Inc.*, 65 Hawaii —, 647 P. 2d 263 (1982). No legislative history or Congressional policy exists to support the airline's argument that Congress intended to exempt airlines from a state's nondiscriminatory general state taxes (property, franchise, net income, sales and use taxes, etc.) simply because some states have historically chosen to measure some of their general business taxes, including property taxes or taxes in lieu of property taxes, by gross income or gross receipts. To our knowledge, Congress has never granted any business an isolated specific exemption from state taxation. Nevertheless, the Solicitor General and the Air Transport Association of America (hereinafter referred to as the ATA) argue that all state taxes on airlines are invalid under the supremacy clause to the extent measured by gross receipts from air transportation.[6] More specifically, the Solicitor General argues that, to the extent measured by gross receipts, the general business

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[4]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and West Virginia. The associate members are the states of Alabama, Arizona, Georgia, Louisianna, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania and Tennessee.

[5]The constitutionality of the Compact was upheld by the United States Supreme Court in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U. S. 452 (1978), *aff'g* 417 F. Supp. 795 (S. D. N. Y. 1976).

[6]"Subsections (a) and (b) therefore are entirely consistent with one another. Subsection (a) clearly bars all State taxes on gross receipts from air carriage. It does so without regard to what the tax is called or how it is labelled by the State." Br. of ATA at 6. See also Br. for the United States at 11.

taxes of the following states fall under the axe of Section 1513: Delaware, Indiana, Maryland, Washington, and West Virginia. (Br. for the United States at 11.)

Because we believe that Congress intended that Section 1513 apply fairly and evenhandedly towards all airlines in all the states, we urge this Court to strike down the belated effort of the airlines, the ATA, and the Solicitor General to construe Section 1513 (a) to produce this arbitrary and unreasonable result.

STATUTES INVOLVED

49 U. S. C. 1513, as amended by Section 532 of the Airport and Airway Improvement Act of 1982,[7] Pub. L. No. 97-248, 96 Stat. 701 provides in pertinent part:

> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . .
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. . . .

Hawaii Rev. Stat. 239-6 (1976) (bracketed material added) provides in pertinent part as follows:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a special rate schedule for students . . . the tax shall be three per cent. . . . The tax imposed by this section is a means of tax-

[7] This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

ing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law of Hawaii] but is not in lieu of any other tax.

In material part, Internal Revenue Code (I. R. C.) Chapter 33 Subchapter C (titled Transportation by Air) lists the taxes imposed by Congress as follows:

SEC. 4261. Imposition of tax

(a) In general.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

. . . .

(c) Use of international travel facilities.—There is hereby imposed a tax of $3 upon any amount paid (whether within or without the United States) for any transportation of any person by air, if such transportation begins in the United States. This subsection shall not apply to any transportation all of which is taxable under subsection (a) (determined without regard to sections 4281 and 4282).

(d) By whom paid.—Except as provided in section 4263 (a), the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

. . . .

SEC. 4263. Special rules.

(a) Payments made outside the United States for prepaid orders.—If the payment upon which tax is imposed by section 4261 is made outside the United States for a prepaid order, exchange order, or similar order, the person furnishing the initial transportation pursuant to such order shall collect the amount of the tax.

. . . .

PART II—PROPERTY

SEC. 4271. Imposition of tax.

(a) In general.—There is hereby imposed upon the amount paid within or without the United States for the taxable transportation (as defined in section 4272) of property a tax equal to 5 percent of the amount so paid for such transportation. The tax imposed by this subsection shall apply only to amounts paid to a person engaged in the business of transporting property by air for hire.

(b) By whom paid.—

(1) In general.—Except as provided by paragraph (2), the tax imposed by subsection (a) shall be paid by the person making the payment subject to tax.

(2) Payments made outside the United States.—If a payment subject to tax under subsection (a) is made outside the United States and the person making such payment does not pay such tax, such tax—

(A) shall be paid by the person to whom the property is delivered in the United States by the person furnishing the last segment of the taxable transportation in respect of which such tax is imposed, and

(B) shall be collected by the person furnishing the last segment of such taxable transportation.

SUMMARY OF ARGUMENT

Hawaii Rev. Stat. Ch. 239 imposes a tax on all public utilities, including all intrastate air, sea, and land carriers. After *Railway Express Agency, Inc. v. Virginia*, 358 U. S. 434 (1959) (hereinafter referred to as *REA II*), the Hawaii legislature revised the tax laws with respect to public utilities and intrastate carriers in order to in-

clude them under the protective umbrella of *REA II*.[8] Although the existing public utilities tax had been held to be in the nature of a property tax,[9] the legislature revised the tax to expressly define the tax as a tax levied on property. The PSC Tax on airlines and other carriers therefore constitutes a property tax, or other general business tax, expressly permitted by Section 1513 (b). After carefully reviewing the history and the nature of the Hawaiian PSC Tax, the legislative history of Section 1513, and the judicial standards employed to determine when a state statute is preempted by an act of Congress, the Hawaii Supreme Court properly and logically concluded that the PSC Tax did not conflict with Section 1513.

Nevertheless, the airlines, the ATA, and the Solicitor General (hereinafter referred to as the airlines and their *amici*) argue that the PSC Tax is invalid to the extent it is imposed on airlines and to the extent it is measured by gross receipts[10] from the transportation of persons by air between the islands of Hawaii. The airlines and their

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[8]

> The purpose of this bill is to protect, from attacks of, unconstitutionality on the basis of the commerce clause the tax on public utilities, airlines, motor carriers, and contract carriers by clearly characterizing the tax as a property tax, measured by gross income. Although the present public utility tax is in the nature of the property tax, it is not clearly defined as a tax in lieu of property taxes as in this bill.

House Standing Comm. Rep. No. 792 (Finance Comm.), *reprinted in* 1963 House Journal 799. See also House Standing Comm. Rep. No. 850 (Ways and Means Comm.), *reprinted in* 1963 Senate Journal 950.

[9] *Hawaii Consolidated Ry. Ltd. v. Borthwick*, 34 Hawaii 269, 281 (1937), *aff'd*, 105 F. 2d 286 (9th Cir. 1939).

[10] " 'Gross income,' 'gross proceeds,' and 'gross receipts' all mean the same." 2 T. Cooley, *The Law of Taxation* 1789 (4th ed. 1924). For a discussion of gross receipts, see generally *id.* at 1710-11, 1785-91.

amici claim that their position is supported by the language of Section 1513 (a), Congressional policy in enacting both ADAP and Section 1513, and by the legislative history of Section 1513 and ADAP.

On the contrary, Section 1513(b) specifically exempts Hawaii's PSC Tax from the preemptive provisions of Section 1513(a). This construction of Section 1513 is amply supported not only by the express language of Section 1513, but also by volumes of legislative history,[11] by appropriate rules of statutory construction (including those applicable to preemptive federal legislation), by Congressional intent to only preempt state taxes that conflict with certain federal taxes paid by *users* of air transportation, and by the Congressional policy and purpose in enacting the Airport Development Air Program (hereinafter referred to as ADAP).

The Solicitor General submits that Congress intended to prevent "forbidden taxes on gross receipts" from continuing "to erode the retained earnings, or ultimately the capital reserves of airlines, while *they* or their customers are at the same time obligated to provide federal revenues to fund ADAP projects throughout the Nation, including those in Hawaii." Br. for the United States at 12 (emphasis added). The legislative history to section 1513 and the three federal user taxes enacted by Congress demonstrate that Congress addressed taxes *on users* of air transportation. Because Congress has not imposed any specific taxes on *airlines* for airport development and because Congress did not address general nondiscriminatory taxation of airline companies, the Solicitor General's use of the word "they" is deceptively wide of the mark.

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[11]See the lengthy appendix of legislative history submitted by Hawaii under separate cover in this cause, hereinafter cited as Leg. Hist. App.

The MTC and participating states strongly believe that Congress' preemption by Section 1513(a) of specific excise taxes on users of air transportation does not exempt the airlines from general business or property taxes that are expressly permitted by Section 1513(b). Congress did not intend to exempt airlines from general business or property taxes on the fortuitous circumstances that these general taxes were traditionally measured in part by gross receipts from air transportation. The extensive legislative history addresses three major subjects: user taxes (those enacted in I. R. C. 4261 and 4271); head taxes; and Ohio's discriminatory tax upon a single business, the airline companies. Nothing in the legislative history addresses general business or property taxes imposed on airlines; nothing in the legislative history supports a Congressional intent to exempt airline companies from these state taxes. The language of Section 1513(b) illustrates the contrary—that Congress specifically intended to exclude general business taxes and property taxes from the prohibition contained in subsection (a). These general business taxes apply to all business and do not discriminate against the airline companies like the Ohio tax did. During the 1973 House Hearings, Ohio's Deputy Tax Commissioner properly told Congress that the Ohio Airlines Tax was "unique" and that Ohio was "probably the only State in the 50 States that has such a tax."[12] Further, the revenues from general state business or property taxes, such as the Hawaii PSC Tax, pay for general governmental services and benefits. They are not imposed

[12]Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 246 (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 142).

upon airport users and the revenues are not intended for airport development. Thus, no reasonable construction of Section 1513(a) supports the position of the airlines and their *amici* in these causes.

ARGUMENT

The broad fundamental issue in this case is to ascertain the Congressional policy embodied in both ADAP and the state tax restrictions contained in 49 U. S. C. 1513. The narrow issue is one of statutory interpretation. The controlling inquiry is first to determine the intent of Congress in enacting Section 1513, and then to determine whether Hawaii Rev. Stat. 239-6 conflicts with this Congressional intent. This brief thus begins with an examination of the legislative history of Section 1513.

I. The Legislative History of 49 U. S. C. 1513 Illustrates No Congressional Intent to Prohibit the Imposition of General Business Taxes, Such As the Hawaii PSC Tax that is Imposed on All Utilities.

A careful examination of the legislative history of S. 38, the bill creating the section codified as 49 U. S. C. 1513, demonstrates that Congress intended to preempt one type of tax only, a tax generally characterized as a "head tax."[13]

In the Senate Report on S. 38,[14] the bill is characterized as having the twofold purpose of: (1) increasing

[13]A head tax is a "per person" tax usually identical on every individual in a class or group. As an air transportation tax, it is usually levied on common carrier passengers on a per-passenger basis. It may be a flat rate tax or a percentage of fare tax. A head tax may be collected directly from the passenger in the form of a boarding or enplaning fee, or imposed upon a carrier and collected indirectly. *See generally*, S. Rep. No. 93-12, 93rd Cong., 1st Sess. (Feb. 1, 1973), *reprinted in* 1973 *U. S. Code Cong. & Ad. News 1434* (Leg. Hist. App. at 108).

[14]*Id.* (Leg. Hist. App. at 108).

(Continued on next page)

federal financial assistance for airport development; and (2) prohibiting "the levying, by State and local governments, of passenger 'head' taxes or use taxes on the carriage of persons in air transportation."[15] Thus, Congress had two goals.[16] It wanted to increase federal funding for airport development "because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly-owned airports."[17] In tandem with this purpose, it recognized

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For illustrative purposes, this brief concentrates on the 1973 Senate Report 93-12 that accompanied S. 38. This bill "is nearly identical to" (119 Cong. Rec. 213) S. 3755, the 1972 version passed by both the Senate and the House but pocket vetoed for budgetary reasons by President Nixon. All of the legislative history—conference reports, bill reports, excerpts in the Congressional Record, and committee hearings—mirrors the content of this 1973 Senate Report, which serves as an accurate representative sample of all the legislative history.

[15]1973 Senate Report, *supra* note 13, at 4 (Leg. Hist. App. at 110).

[16]That these two goals were considered inseparable is emphasized throughout the report. In the "Conclusion" to the report, the Committee states:

> Nonetheless, the Committee views S. 38 as an aviation development package—the components of which cannot be separated. We believe that if the prohibition on *local head taxes* was not a part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S. 38. If *local taxes* on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program. If *local head taxes* become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.

Id. at 26 (emphasis added) (Leg. Hist. App. at 122).

[17]*Id.* at 4 (Leg. Hist. App. at 111).

the need to prevent other government agencies from establishing passenger head taxes.

The funds for this projected airport development were to come from user taxes on aviation system users. Congress intended to ensure that these user taxes would be uniformly imposed and that local head taxes would "not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation."[18]

That Congress intended to prohibit only head taxes is emphasized throughout the Senate Report. Explaining the prohibition on head taxes, the report states:

> This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax. This provision will be discussed later but the Committee points out here that in denying government agencies potential revenues from passenger head taxes, it is also responding to the local need for greater Federal assistance in airport grants.[19]

The 1973 Senate Report demonstrates that Congress was deeply concerned with the direct burden local head taxes would place on individual air passengers. Congress feared the possible proliferation of local head taxes in the aftermath of *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), which held that a local head tax on airline passengers did not violate the commerce clause.[20] This concern is expressed in

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[18] *Id.*

[19] *Id.* at 11-12 (Leg. Hist. App. at 112).

[20] The entire text of the *Evansville* decision was reproduced in both 1972 Senate Hearings and the 1972 House Hearings:

Bills to Amend the Airport and Airway Development Act of 1970: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate

(Continued on next page)

detail at page 17 (Leg. Hist. App. at 112-13) of the 1973 Senate Report:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

This portion of the report is followed by several pages of newspaper articles describing the reaction of

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Comm. on Commerce, 92d Cong., 2d Sess. 241-60 (Apr. 25 & 26, June 12, 1972); Bills Concerning State Taxation and the Federal Share of Funds to be Used for Airport Construction, Maintenance, and Improvements: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 2-23 (June 19 & 23, 1972).

Apparently, Congress was not only concerned with the results of the *Evansville* decision, but Congress was totally unprepared for the outcome of the decision itself:

> This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. The Committee believed there was no danger of this because the basic constitutional guarantee of a citizen's right to unhindered interstate travel, and a U. S. Supreme Court decision which had prevailed since 1867, indicated that such taxes could not be constitutionally imposed.

Id. at 21 (Leg. Hist. App. at 118-19).

individual air passengers to the imposition of head taxes. The articles are replete with quotes from irate air passengers. Congress was concerned with:

> [T]he chaos which such local taxation works on the national transportation system. The head tax brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes."[21]

In addition, the 1973 Senate Report includes a table of thirty-one jurisdictions charging head taxes.[22]

While, the Commerce Committee was primarily concerned with the imposition of a head tax directly on the passenger, it was also concerned with potential indirect imposition of head taxes on the airlines as well. The Committee states:

> Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> If the passenger must pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers, where law permits, because of the cost and difficulty of collection, or even refusal of passengers to pay, it still will lead to increased air travel costs. If the carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million. The airlines could not reasonably be expected to bear such a burden. In the end, a fare increase would have to be imple-

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[21] *Id.* at 17 (Leg. Hist. App. at 113).

[22] *Id.* at 21. Throughout the history of debates in the Congressional Record, the increasing number of jurisdictions levying head charges was closely monitored. The last tally occurs in 119 Cong. Rec. 17,345 (May 30, 1973):

> The main purpose of this bill as the members recall is to ban the so-called airport head tax. We had seven of these taxes when we considered the legislation last year. This year we have 44.

mented. Thus, the air passenger loses either way on state and local head taxes. In addition, there would come a point when this added cost could make air travel uneconomical for some people, and thus inhibit the growth of the air transportation system, particularly in short-haul markets.[23]

This reasoning explains the inclusion in Section 1513 (a) of the phrases "directly or indirectly" and "on the carriage of persons traveling in air commerce." Congress was also concerned with discriminatory taxes against airlines, such as Ohio's tax. See *supra* p. 10. These twin concerns explain the inclusion of "on the sale of air transportation or on the gross receipts derived therefrom." Congress thus intended to prohibit "head taxes" (whether imposed on the users or imposed in the form of a discriminatory tax levied only on airlines) and to prohibit them in any form, including a percentage of fare tax. The inclusion of this language thus prohibited local governments from enacting a "pass-on head tax:" imposing a head tax by actually calling it something else or by collecting it from the airline rather than from the airline passenger. The airlines and their *amici* argue that because the statute includes the words "directly or indirectly" and "gross receipts," Congress intended to prohibit all state taxation of air carriage to the extent *measured by* gross receipts. This argument is incorrect, flies in the face of the legislative history of Section 1513, and flies in the face of the exception provisions in Section 1513(b).

In addition, although not raised in the court below, if Congress intended to prohibit the states from exercising their general taxing powers, this Congressional prerogative may encroach upon the states' power to tax as

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[23] *Id.* at 22 (Leg. Hist. App. at 19-20).

traditionally reserved to the states by the tenth amendment. As early as 1819, this Court stated as follows:

> [t]hat the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union . . . are truths which have never been denied.[24]

In *Gibbons v. Ogden*, the Court further recognized that

> [t]he power of taxation is indispensable to their [the states] existence . . . . Congress is not empowered to tax for those purposes which are within the exclusive province of the states.[25]

In a more modern context, this Court has further recognized the existence of

> limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . . The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity of their ability to function in a federal system.[26]

Assuming arguendo that Congress intended to prevent the states from levying general business taxes or property taxes measured by gross receipts, this exercise of power may be barred by the tenth amendment. This constitutional issue, although not directly raised in these cases, should be considered by this Court in its construction of Section 1513.

II. Congress Intended that Subsection (a) Preempt State Taxes Similar to the Three Federal User Taxes Previously Enacted in 1970 by Congress.

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[24] *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 425 (1819).

[25] 22 U. S. (9 Wheat.) 1, 199 (1824).

[26] *National League of Cities v. Usery*, 426 U. S. 833, 842-43 (1976).

An examination of the user taxes actually enacted by Congress, in light of the similar taxes prohibited in subsection (a), suggests a reasonable and logical interpretation of Section 1513 which conforms to legislative history and Congressional policy. Congress imposed three taxes on the users of air transportation: (1) an 8% tax on the price of domestic passenger tickets (required to be paid by the purchasers of the tickets); (2) a $3 head tax on international travelers (required to be paid by international travelers); and (3) a 5% tax on the cost of air freight (required to be paid by the persons shipping the freight).[17] These three federal user taxes represent the *subjects of taxation* expressly prohibited by Congress in Section 1513(a).

The three subjects of taxation expressly prohibited by Section 1513(a) closely parallel the three federal user taxes. The 8% tax on the price of domestic passenger tickets is clearly a tax imposed on persons traveling in air commerce and indirectly a charge on the carriage of persons traveling in air commerce. The $3 head tax on international travelers is clearly a head charge on persons traveling in international air commerce. A 5% tax on the cost of air freight is clearly a tax on the sale of air transportation.

Congress was extremely concerned with the potential for local duplication of these federal taxes, directly (the local governments collected the tax) or indirectly (the airlines were required to collect the tax), on *users* of air transportation. Congress justifiably feared that local user taxes would conflict with the policies and goals of ADAP by duplicating federal user taxes already imposed by Congress—on persons using air transportation—to finance

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[17] The texts of these taxes are reproduced in this brief above at pp. 6-7. See also Br. of the United States at 7.

airport development and safety. This Congressional concern was justified following *Evansville*. Congress was also undoubtedly concerned with any *discriminatory* taxes, such as the Ohio tax, that singled out either users of air transportation or airline companies for unfair and burdensome taxes.

When the language of Section 1513(a) is interpreted to conform with these policies and goals of ADAP, it readily evidences logical, reasonable, and harmonious restrictions on the taxing powers of the states and their political subdivisions. This interpretation of Section 1513(a) easily reconciles with the language of 1513(b), which excludes nondiscriminatory general business or property taxes imposed on airlines from the reach of Section 1513(a). If these policies and goals are ignored or misstated, and subsection (b) of Section 1513 is ignored (as they are by the airlines and their *amici*), Section 1513 is divorced from any semblance of reasonableness or logic.[28]

III. The Purpose of Subsection (b) is to Narrow the Scope of Subsection (a).

The purpose of Congressional enactment of subsection (b) was to ensure that subsection (a) would not be interpreted to prohibit *taxes* (subjects of taxation—not their measures) that were not enumerated in subsection (a).

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[28]As construed by the airlines and their *amici*, Section 1513(a) gives airlines general business tax or property tax immunity in those states that have historically measured their general business or property taxes by gross receipts, rather than measuring these taxes by other available measures. No reason can possibly exist, as evidenced by the silence in the legislative history, to explain the argument of the airlines and their *amici* that Congress intended to prohibit selected general business taxes measured by gross receipts while also permitting all other general business taxes imposed on airlines to remain intact. This arbitrary distinction has no rational relationship with, and furthers no policy of, the Congressional purpose in enacting ADAP.

When subsection (b) is considered in interpreting subsection (a), and when the federal user taxes actually imposed by Congress and legislative purpose and history are also considered, it is clear that Congress intended to preempt only those state taxes that encroached upon the federal scheme. When Section 1513(a) is viewed in this context, seven items are relevant: (1) This Court's decision in *Evansville* is closely associated with the problem that Section 1513(a) was enacted to solve; (2) Section 1513(a) was specifically enacted to prohibit taxes *imposed on* persons or the carriage of persons traveling in air commerce, as well as taxes *imposed on* the "sale of air transportation or on the gross receipts derived therefrom"; (3) Congress intended that the states were only precluded from taxing the *subjects of taxation* specifically enumerated in subsection (a); (4) subsection (b) explicitly explains that subsection (a) does not apply to property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services (including airline services), or to comparable general taxes; (5) the only federal user taxes imposed by Congress to fund the ADAP trust fund were taxes imposed on persons using air transportation: no taxes were imposed on airlines; (6) *nothing* in the legislative history of Section 1513 evidences a Congressional intent to relieve airline companies of any general taxes imposed on them as a part of a state's traditional general business or property tax program; and (7) the only manner in which subsections (a) and (b) can be construed to produce a harmonious whole is to realize that subsection (a) prohibits specific *subjects of taxation* (the legal incidences of taxation) and not the *measures* of the general taxes that are permitted by subsection (b).

In sum, subsection (a) should be limited to a very narrow class of *subjects of taxation*: specific excise taxes

imposed upon users of air transportation, not general business taxes or property taxes to the extent measured by gross receipts.

IV. The "On the Gross Receipts Derived Therefrom" Language in Subsection (a) Refers to a Narrow Subject of Taxation (Taxes on Gross Receipts) and Does Not Prohibit General Business Taxes Measured By Gross Receipts: A Tax on Property Measured By Earnings Is Different From A Tax On Earnings.

A vast difference separates the subject or legal incidence of a tax (*what the tax is imposed on*) from the measure of a tax (*how the tax is computed*). Furthermore, courts have long recognized the difference between these related, but analytically separate, concepts. A corporate franchise tax imposed on the privilege of conducting a business in a state measured by gross receipts is a franchise tax, *not a tax on gross receipts* from *sales*. A property tax measured by gross receipts is a property tax, *not a tax on gross receipts* from *sales*.[19]

More specifically, a vast difference separates a tax imposed *on the gross receipts from the sale* of air transportation and a *property tax* (the PSC Tax) *measured by gross receipts* from the airline business. Further, the legal incidence of a tax on the sale of air transportation is *on the sale*. *The sale* of air transportation represents both the subject of taxation and the taxable legal incidence. Tax liability is triggered by *a sale*. The taxable event or incidence occurs where the sale takes place. An example of this tax would be a tax imposed on the *sale* of airline tickets or on the *sale* of airline freight transportation. This hypothetical tax is analogous to the ADAP taxes actually

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[19]See generally the cases cited by counsel in *Pacific Co. v. Johnson*, 285 U. S. 480, 486 (1932).

enacted by the federal government in these cases. This tax has nothing to do with the actual furnishing of transportation within the state. It is simply imposed on a local incidence—a sale—which could take place in any state regardless where the transportation services are actually rendered by the airlines. In contrast, the legal incidence of a corporate franchise tax is where the corporate franchise tax privilege is exercised and its measure must be related to the exercise of the corporate privilege. The legal incidence of a property tax occurs when the property (tangible or intangible) is owned and used in the taxing state.

That the *measure* of a tax permitted by subsection (b) can include income from a *subject* of taxation prohibited by subsection (a) is specifically supported by numerous decisions of this Court regarding the inclusion of exempt federal government obligations in state corporate franchise taxes that were measured by property, net worth, or net income. *See Werner Machine Co. v. Director of Division of Taxation,* 350 U.S. 492 (1956); *Pacific Co. v. Johnson,* 285 U.S. 480 (1932); *Educational Films Corp. v. Ward,* 282 U.S. 379 (1931); *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911); *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902); *Home Ins. Co. v. New York,* 134 U.S. 594 (1890); *Society for Savings v. Coite,* 73 U.S. (6 Wall.) 594 (1867); *Provident Institution v. Massachusetts,* 73 U.S. (6 Wall.) 611 (1867); *Hamilton Co. v. Massachusetts,* 73 U.S. (6 Wall.) 632 (1867). As stated in *Werner Machine*: "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." (350 U.S. at 494).

In addition, this Court has traditionally differentiated between a *subject of taxation* and its *measure* in determining the scope of implied immunity granted taxpayer under the Supremacy Clause of the United States Constitution. *See* Br. for Appellee at note 41.

Gross receipts taxes arise in two general contexts. First, gross receipts can represent the *subject* or legal incidence of a tax: for example, a tax on the gross receipts of a particular industry. Second, gross receipts can represent the *measure* of a tax: for example, a property tax or franchise tax measured by gross receipts. A tax on property measured by earnings is different from a tax on earnings. The controlling question in this case is the subject or legal incidence of the tax—not its measure. In a series of cases, this Court has held that taxes on gross receipts that derived from interstate commerce unconstitutionally violate the commerce clause. *See Meyer v. Wells, Fargo & Co.*, 223 U.S. 298 (1912); *Galveston, Harrisburg and San Antonio Ry. Co. v. Texas*, 210 U.S. 217 (1908); *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U.S. 326 (1887); *Fargo v. Michigan*, 121 U.S. 230 (1887).

In another series of cases, this Court has held that the inclusion of gross receipts from interstate commerce in the measure of state franchise or property taxes does not violate the commerce clause. *See Canton R. R. Co. v. Rogan*, 340 U.S. 511 (1951); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450 (1918; *United States Express Co. v. Minnesota*, 223 U.S. 335, 343 (1912); *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U.S. 379, 383 (1903); *Maine v. Grand Trunk Ry. Co.*, 142 U.S. 217 (1891). The

reasoning of these cases is that a franchise or property tax measured by gross receipts is not a tax imposed on gross receipts from interstate commerce that are otherwise exempt from state taxation. Thus, this Court has invalidated taxes levied *on the gross receipts* derived from the carriage of freight and passengers in interstate commerce; it has also upheld taxes imposed on the franchise or property of interstate businesses even though the taxes were measured by gross receipts from interstate commerce.

In a more modern judicial setting, compare *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954) (*REA I*) and *REA II*. *See also* 1 T. Cooley, The Law of *Taxation* 849 (4th ed. 1924).

This illustrates that a subject of taxation prohibited by Section 1513 (a) may be included in the measure of a subject of taxation permitted by Section 1513 (b). As stated in *United States Express*:

> A question, in principle, not unlike the one here presented, came before this court in *Flint v. Stone Tracy Co.*, 220 U.S. 107. In that case it was contended that the income of the corporations sought to be taxed under the Federal law, included, as to some of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the Federal Government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power and to measure a legitimate tax by income derived, in part at least, from the use of such property. *Flint v. Stone Tracy Co., supra*, 162, 3, 4 and 5.

223 U.S. at 344. Thus, the airlines and their *amici* erroneously assume that no difference exists between a tax on

gross receipts from sales of air transportation and the PSC Tax (a property tax) measured by gross receipts from the airlines business.[30]

V. Hawaii's PSC Tax Is Permitted By Subsection (b) And Is Not Prohibited By Subsection (a).

The basic question in interpreting Section 1513 is what *taxes* did Congress expressly prohibit in subsection (a) in light of the *taxes* expressly permitted in subsection (b)?

Hawaii's PSC Tax is a tax expressly permitted by Section 1513(b). It is a tax imposed on the tangible property, intangible property, and going concern value of airlines as *measured by* their gross receipts (a property tax).[31] Because Congressional enactment of Section 1513 (b) specifically excluded the nondiscriminatory PSC Tax from the preemptive language of Section 1513(a), Hawaii Rev. Stat. 239-6 is not preempted. A contrary conclusion is not supported by the language of Section 1513(b), Congressional history, a technical interpretation of all the provisions of Section 1513, proper rules of statutory construction, or simple logic.

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[30]When a property tax is improperly measured by gross receipts (which is not the case here) it may well be construed as an invalid attempt by the state to impose a tax on exempt receipts. *See Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 301 (1912).

[31]The PSC Tax imposed by Hawaii Rev. Stat. 239-6 is a means of taxing the airline's personal property, including intangibles and going concern values. See *infra* pp. 7-8.

Neither the airlines nor their *amici* contend that the tax in question is a tax directly or indirectly imposed on persons or the carriage of persons traveling in air commerce. While they do not address this issue, they also do not argue that the tax in question is imposed "on the sale of air transportation or on the gross receipts derived therefrom." Clearly, the tax in question is not imposed either on the sale of air transportation or on the gross receipts derived from the sale of air transportation.

In support of a contrary position, the airlines and their *amici* argue that this case poses no serious statutory construction question because Section 1513(a) is not ambiguous and its plain meaning controls.[32] In failing to properly analyze the relationship of subsection (a) and subsection (b), they misstate the Congressional intent in enacting ADAP and give subsection (a) an unsupportable, irrational, and arbitrary interpretation. They argue that Section 1513(a) on its face manifests a clear intent to invalidate any taxes on airlines to the extent these taxes (irrespective of their subject, purpose, or taxable incidence) are measured by gross receipts traceable to the transportation of persons by air. This argument attempts to prove too much and directly conflicts with the language of subsection (b) which permits, for example, a sales or use tax on the sale of tangible property and on airline services.[33] Sales and use taxes are *always* measured by gross receipts derived from the sales of tangible personal property or the rendition of services within the state.[34]

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[32]The airlines and their *amici* rely upon subsection (b)'s use of the phrase "other than those enumerated in subsection (a)" and the phrase "or on gross receipts derived therefrom" in subsection (a) to support their arguments. (*See e. g.*, Br. of ATA at 5; Br. for the United States at 13.) However, subsection (a)'s phrase "on the gross receipts derived therefrom" modifies only the last antecedent phrase, the "sale of air transportation." See Br. for Appellee at Part IV.

[33]As noted by the Hawaii Supreme Court, carried to its logical conclusion, the argument of the airlines and their *amici* "decrees a federal preemption of the entire field of commercial aviation taxes" (Hawaiian Airlines Jur. Stmt. at A-13) in direct conflict with the express language of Section 1513(b). Most general business taxes are traceable, directly or indirectly, to the gross receipts generated by the business.

[34]See e. g., Wash. Rev. Code. Section 82.04.270 ("the gross proceeds of sales of such business"). See also the taxes discussed in *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954); *McLeod v. J.E. Dilworth Co.*, 322 U. S. 327 (1944); *General Trading Co. v. State Tax Comm'n*, 322 U. S. 335 (1944); *International Harvester Co. v. Department of Treasury*, 322 U. S. 340 (1944); *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).

Section 1513(a) and Section 1513(b) should be interpreted to produce an internal harmonious whole, a statutory pattern that is also consistent with the policies and goals of ADAP as disclosed by its legislative history. When so construed, it is evident that Congress did not intend to exempt airlines from these taxes upon the happenstance that these taxes traditionally have been measured by gross receipts.[35] Subsection (b), consistent with subsection (a) and legislative history, evidences Congressional intent to permit the imposition of general business and property taxes on airlines, without placing any restrictions on the measures of these taxes.

VI. The Solicitor General Seriously Misinterprets the Statutes, the Legislative History, and the Congressional Policy Behind ADAP.

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[35]Hawaii's separate appendix of legislative history illustrates that only several passing references were made regarding taxes on "gross receipts." What the airlines, the Solicitor General, and the ATA ignore is that no legislative, economic, or political motive supports an argument that Congress allegedly intended to prohibit franchise or property taxes to the extent they are (historically) measured by gross receipts. What Congressional policy is served if Hawaii is permitted to use an alternate tax measure to impose a general tax burden that is double or triple the burden currently imposed under its allegedly invalid gross receipts measure?

For example, what Congressional policy is furthered if Hawaii is permitted to multiply its general tax burden so long as it measures its PSC Tax by capital stock, net income, or net worth (or imposes a property tax measured by *ad valorem* property value)? The argument of the airlines and their *amici*, that Congress intended to prohibit any general business tax that happens to be measured by gross receipts, lacks merit. This is illustrated by the statement in the Br. of the United States at 11 n.15, which lists five states "that tax annual gross receipts or gross income without expressly exempting airline gross receipts." This footnote is deceptive when associated with the text it supports: the citations to current code provision do not reveal that these taxes were enacted many years prior to Congressional adoption of ADAP and Section 1513.

The *amicus* brief filed by the Solicitor General seriously misinterprets the fundamental problem in these two cases. In arguing for broad tax exemptions for the airline industry, the Solicitor General argues that "[s]tate court decisions such as the present one, unless corrected, will progressively undermine the federal fiscal structure for the funding of civil aviation facilities." Br. for the United States at 10. The Solicitor General even goes so far as to argue that Congress amended ADAP by including the restrictions contained in subsection (a) to protect the "retained earnings, or ultimately the capital reserves of airlines" from any form of taxation measured by gross receipts. *Id.* at 12. The boundless implications of these statements are not supportable. The taxes actually enacted by Congress, which correspond to the preemption prohibitions in subsection (a), are all imposed on and paid by the *users* of air transportation, not the airlines. All the income generated from these user fees is earmarked for airport development.

Reduced to a syllogism, the Solicitor General argues as follows: (1) *Major Premise:* Congressional enactment of ADAP evidenced Congressional intent to promote airport development and safety; (2) *Minor Premise:* Congress imposed certain federal user taxes on persons using air transportation to finance airport development; (3) *Conclusion:* Therefore, Congress intended to exempt airlines from any existing general business or property taxes to the extent that these taxes are measured by gross receipts from sales of air transportation.[36] This argument is a ***non sequitur***. It is analogous to arguing that when Congress enacted a tax on A (user taxes)

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[36]To our knowledge, Congress has never granted preferential tax treatment and exempted a single industry (such as airlines) from any state or local tax.

to promote activity B (airport development), it intended to prohibit the states from imposing taxes on C (general business taxes measured by gross receipts) to promote unrelated activity D (general state government expenditures).

CONCLUSION

In the light of the history of Section 1513 and the specific language of subsection (b), coupled with the nature of the taxes that Congress actually imposed, there is little reason to assume that Congress intended to preempt any kinds of taxes other than taxes that would directly or indirectly duplicate the federal user taxes it imposed in 1970 on the *users* of air transportation. The general language in Section 1513, as illustrated by the legislative history, was to protect the federal user tax base by prohibiting the states or their political subdivisions from either directly or indirectly imposing similar kinds of taxes.

A vast difference separates subsection (a)'s prohibited *subjects* of state taxation from the general business or property taxes permitted by subsection (b) and the *measures* (such as gross receipts) of these permitted taxes. A property tax or general business privilege (franchise) tax, although *measured* by gross receipts, is not a tax on the sale of air transportation nor can such taxes discriminate against airlines.

Neither logic nor legislative history supports the argument of the airlines and their *amici* that Congress intended to give unprecedented state tax exemptions to a single business—the airlines—simply because some state taxes were traditionally measured by gross receipts. Obviously, the airlines initially interpreted the federal statute in this manner or they would not have waited many years to

bring this action, and comparable actions, in other state courts.[37] Their decision to rely upon Section 1513(a) to invalidate Hawaii's PSC Tax is obviously the result of a belated statutory interpretation that is devoid of any Congressional history or purpose or any concern expressed by the airlines in eliciting Congressional support for the enactment of Section 1513.

We therefore respectfully urge this Court to affirm the decision and judgments of the Hawaii Supreme Court in this consolidated case.

Respectfully submitted,

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Multistate Tax Commission and
Participating States

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[37]Representing most of the nation's scheduled airlines, the ATA gave extensive testimony at the Hearings held by both Houses of Congress. The ATA was thus aware of the intent and scope of Section 1513 as enacted. Several years passed before several cases, similar to this case, arose almost simultaneously in the various state courts. The ATA was the plaintiff in the litigation in New York State.

In January, 1983 the Washington Department of Revenue issued a Request for Production of Documents No. 2 in *Republic Airlines v. Washington Dep't of Revenue*, No. 82-2-01723-7 (Thurston County Super. Ct. filed Dec. 30, 1982). Washington's request was as follows:

> Any document prepared by or received by Republic describing the impact of the Airport Development Accelleration Act of 1973, 49 U. S. C. Section 1513, on the tax liability of Republic. We here do not seek privileged communications between counsel and client, but rather in-house memoranda or publications in the nature of trade publications received by Republic from trade associations or industry lobbyists.

Further proceedings in this cause, as well as the response to this request, have been held in abeyance until this Court decides these Hawaiian airlines cases.